

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

25 February 2003

Re: Triennial Review Proceeding, WCB Docket Nos. 01-338, 96-98, 98-147

Dear Ms. Dortch,

On Tuesday, February 25, 2003, the undersigned, on behalf of Covad Communications Company, made separate oral *ex parte* presentations to Jordan Goldstein, Lisa Zaina, and Dan Gonzalez, in response to specific questions from each of them regarding the proper framework for the Commission's disposition of the linesharing UNE. The substance of those presentations is reflected below.

At the outset, Covad strongly encouraged the FCC to issue a *sua sponte* reconsideration¹ of the announced linesharing UNE phaseout. Based upon recent public statements by the Bell companies², the FCC's decision to eliminate linesharing in the name of promoting investment incentives appears to have been a grave and unnecessary error. Given the strong reservations expressed by two of the three commissioners who voted to eliminate linesharing³, the Bells' public statements strongly validate those expressions of concern. Rather than celebrate the linesharing relief granted by the Commission, the Bells have chosen to excoriate those who gave it to them. The Commission should not punish broadband consumers and threaten nationwide broadband deployment by eliminating linesharing in order to give the Bell companies something they clearly do not want.

In the alternative, Covad encouraged the Commission to clarify in its order that it is providing a specific state role for implementation of the FCC's linesharing UNE decision. That state role would, logically, track the state role regarding disposition of the

¹ "The Commission may, on its own motion, set aside any action made or taken by it within 30 days from the date of public notice of such action . . ." 47 CFR § 1.108. In other words, at any time from the date of the open meeting adopting the Triennial Review item until 30 days after the date of publication of that item in the Triennial Review, a majority of the Commission may reconsider its linesharing UNE ruling.

² See, e.g., "Despite Winning Ruling, Bells Shirk DSL Investment Pledge," A1, Wall Street Journal, February 21, 2003.

³ See, e.g., Statement of Commissioner Michael Copps, WCB Docket Nos. 01-338, 96-98, 98-147, February 20, 2003 ("There are aspects of this Order that are certainly not my preferred approach, but which I have had to accept in order to reach compromise. In particular, there is the decision to eliminate access to only part of the frequencies of the loop as a network element. I would have preferred to maintain this access, also known as line sharing. I believe that line sharing has made a contribution to the competitive landscape. Instead of recognizing this contribution and encouraging it, we provide today only an extended transition period to allow competitors to purchase the entire loop facility as a network element, or to pair with a voice provider, to offer the full range of services to a customer.")

switching UNE. The Commission apparently has based its linesharing framework on implementation of the D.C. Circuit decision in *USTA v. FCC*, which requires the FCC to examine the effect of the presence of cable modem services. In applying this framework, the FCC would make no conclusions as to the competitive impact of cable modem availability that would bind it in further proceedings, but rather would base this conclusion solely on the cable modem language in *USTA*.

Logically, where cable modem is not deployed in the same geographic area as ILEC DSL, existing linesharing UNE rules would be maintained. Where cable modem is deployed in the same geographic area as ILEC DSL, the Commission would establish a rebuttable presumption that the linesharing UNE would be phased out and replaced by a linesharing interstate service, pursuant to sections 201/202 of the Act. In addition, where cable modem and ILEC DSL are both available (as determined by a state commission), the state commission may rebut the federal presumption against impairment by concluding that, based on state-specific conditions, competitors are impaired without access to the linesharing UNE. That conclusion must be based on the state commission's fact-specific analysis of the actual availability of alternatives to linesharing, such as stand-alone unbundled loops. Factors to be analyzed would include ILEC performance on timely stand-alone loop delivery, cost of stand-alone loop installation, and other operational and financial impairments.

If the state commission does not rebut the presumption against impairment, the linesharing UNE will be phased out, and existing linesharing UNE terms, conditions, and prices will remain available until the effective date of the ILEC interstate tariff. In addition, the FCC's stated three-year transition period will apply. States that have independent authority to adopt market-opening rules would not be disturbed in their ability to do so.

Respectfully submitted,

/s/ Jason Oxman

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